IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF IDAHO

IN RE	)	
	)	
MICHAEL B. BARON,	)	**Case No. 97-30388**
MICHAEL B. BARON, M.D. and	)	
BEVERLY BARON,	)	
	)	**MEMORANDUM OF DECISION**
Debtors.	)	
	)	
	)	
	)	

HONORABLE TERRY L. MYERS, UNITED STATES BANKRUPTCY JUDGE

D. Ray Barker, Moscow, Idaho, for Debtors.

Janet F. Wallen, New City, New York, appearing pro se.

C. Barry Zimmerman, Coeur d'Alene, Idaho, Trustee.

Michael Baron ("Baron") believes that the proof of claim filed by his ex-wife, Janet Wallen ("Wallen") in this chapter 13 case is substantially overstated. Baron and his present wife ("Debtors") therefore objected to the allowance, and alleged priority status, of that claim. The objection was taken under advisement at the conclusion of an evidentiary hearing. The parties were provided the option of submitting post-hearing written argument and have energetically availed themselves of that opportunity. The

Court having completed its review and analysis, this decision constitutes its findings of fact and conclusions of law upon this contested matter. Fed.R.Bankr.P. 7052, 9014.

BACKGROUND

Debtors filed a voluntary chapter 13 petition for relief on October 21, 1997. Wallen was listed as a nonpriority unsecured creditor on Debtors' schedule F in the amount of $3,500.00. Debtors characterize this as a debt for "medical bills for children or tuition." The debt was not listed as disputed, contingent or unliquidated.

Debtors filed their chapter 13 plan on November 26, 1997. This plan provided for 36 monthly payments of $170.00 plus commitment of 1997-1999 tax refunds.[1] It provided for treatment of some priority unsecured claims, but not in regard to any Wallen had or might assert. Debtors also filed on that date a Notice of Confirmation Hearing, advising that this hearing was set for January 13, 1998 and that objections were required to be filed and served before that date.[2]

A certificate of service filed by Debtors' attorney establishes that Wallen, along with other creditors, was served by mail on November 26, 1997 with the proposed plan and notice of hearing on confirmation. She filed no objection to confirmation. Nor did any other creditor. The plan was confirmed on January 13, 1998.

Wallen on January 9, 1998 timely filed a proof of claim in the amount of $63,845.55 as a priority unsecured claim. Debtors objected to the proof of claim in May, 1998. Their objection alleges that the amount of the claim is not justly due and owing. It

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[1] The plan was amended at confirmation to a 43 month term.

[2] This notice complied with Fed.R.Bankr.P. 2002(b).

also asserts that the claim, to the extent it is allowed, is not entitled to be treated as a priority claim because the educational and medical expenses at issue were incurred by the adult children of Baron and Wallen. The objection therefore requests that the claim be disallowed or, alternatively, disallowed treatment as a priority claim.

Wallen, who represents herself pro se, filed and served a response to the objection later that same month. Four months later, she filed a document essentially inquiring of the Trustee as to the status of the matter, since the objection had never been set for hearing or submitted for ruling. Five months after this September 1998 inquiry, the Trustee filed in February 1999 a motion to dismiss the Chapter 13 case pursuant to § 1307(c) on the basis that there was a priority claim of record which was not funded in full by the confirmed plan. Hearing was scheduled on the Trustee's motion in March. Debtors finally scheduled a hearing on their objection to Wallen's claim for later that spring. The Trustee's dismissal motion was continued in order to be heard simultaneously with the objection to the claim.

The objection to claim ultimately came on for hearing in the summer of 1999, after additional continuance on Wallen's request due to her job as a school teacher. Subsequent to the late July hearing, the parties submitted over the following 6 weeks their written closing arguments. Rather than merely addressing the pleadings of record and evidence introduced at hearing, both parties presented and discussed significant additional matters, mostly factual. Debtors objected to Wallen's closing argument as attempting to introduce matters not properly placed into evidence. Wallen counters that she was simply responding "in kind" to Debtors' post-hearing briefing.

ISSUES PRESENTED

The primary issue the parties submit relates to the amount of Wallen's claim. They ask the Court to determine whether or not each of dozens of separately itemized medical or educational expenses incurred by Baron and Wallen's children, or by Wallen, fall within certain July and August 1995 orders of a New Jersey state court.[3] As noted, the objection also contested the alleged priority status of Wallen's claim under § 507(a)(7).

In reviewing and analyzing the record and submissions of the parties, the Court also discerned issues concerning the effect of confirmation of the plan, and the plan's treatment (or, more accurately, lack of treatment) of Wallen's claim. In the final analysis, the Court finds these issues effectively eliminate the need to resolve the question of the calculation of the claim under the New Jersey orders.

DISCUSSION

1. Priority claim.

Wallen asserts her claim is entitled to priority under § 507(a)(7). Debtors' initial objection disputed priority status. But in their post-hearing submissions Debtors withdrew this contention, and concede that any claim of Wallen found valid is entitled to such

[3] Consent Order Resolving All Issues of Plenary Hearing (July 10, 1995), as supplemented by Order Resolving Issues of Past, Present and Future Medical Bills (August 4, 1995), and by Order Vacating All Child Support Arrears (August 4, 1995), all entered by the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County.

priority status.[4] *See*, "[Debtors'] Argument in Support of Objection to Claim," at p. 39-40.[5] While the Court is not necessarily bound by the parties' agreement, it will be accepted here. Wallen's claim is therefore a priority claim under § 507(a)(7).

2. Treatment of priority claims in chapter 13.

In order to be confirmed, a debtor's plan must comply with all applicable provisions of chapter 13 and other applicable provisions of the Code. § 1325(a)(1). Among these are the mandatory provisions of § 1322(a) including:

> (a) The plan shall –
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> . . .
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> (2) provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim[.]

§ 1322(a)(2). Support obligations are priority debts under § 507(a)(7).

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[4] Post-majority educational and medical expenses can be a nondischargeable support obligation under § 523(a)(5). *In re Seixas*, 239 B.R. 398 (9th Cir. BAP 1999).

[5] Debtors still dispute the validity and amount of the claim, arguing essentially that Wallen grossly overstates the amount of expenses falling within the ambit of the parties' prior agreements and/or the relevant state court orders, and/or that she has failed to sufficiently document or prove such expenses.

A debtor's compliance with § 1322(a)(2) is important because § 1328(a)(2),[6] by its reference to § 523(a)(5),[7] renders such support obligations nondischargeable except to the extent actually paid under the plan. *In re Gustavson*, 99.1 I.B.C.R. 5 (Bankr. D. Idaho 1999); *In re Engel*, 151 B.R. 542,543, 93 I.B.C.R. 63 (Bankr. D. Idaho 1993). *Cf.*, *In re Hutton*, 99.1 I.B.C.R. 12, 13 (Bankr. D. Idaho 1999) (addressing student loans under §§ 1328(a)(2) & 523(a)(8)).

Debtors' confirmed plan here did not provide for payment of any priority support debt. Paragraphs 2(a)(1), (2) and (3) of the confirmed plan provide for treatment only of three categories of priority debts: the Trustee's fees, Debtors' attorney's fees, and taxes.

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[6] Section 1328(a)(2) provides:

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt --
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> . . .
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> (2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title[.]

[7] Section 523(a)(5) provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt –
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> . . .
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> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement[.]

This plan treatment is consistent with the manner in which Debtors scheduled Wallen's claim, i.e., as a general unsecured claim.

3. *Res judicata* and § 1327(a).

The effect of confirmation of the plan is set forth in § 1327(a) which provides:

> (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

This Court in *Carrier v. Croner (In re Croner)*, 99.1 I.B.C.R. 16 (Bankr. D. Idaho 1999) recently summarized the *res judicata* effect of confirmation under this provision.

> The confirmation of a Chapter 13 plan is res judicata as to all justiciable issues which were, or could have been, decided prior to or at the confirmation hearing. *Multnomah County v. Ivory (In re Ivory)*, 70 F.3d 73, 75 (9th Cir. 1995). "Applying res judicata to confirmation orders enforces the doctrine of finality as expressed in [Section] 1327(a)." *Bright v. Ritacco (In re Ritacco)*, 210 B.R. 595, 597 (Bankr. D. Oregon 1997). In order to avoid the res judicata effect of Defendants' Amended Chapter 13 Plan, and to prevent Defendants from receiving a discharge, Plaintiff must qualify under one of a limited number of theories through which relief from the confirmation order may be available.
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> . . .
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> The Court has on prior occasions addressed the policy considerations concerning the effect of confirmation orders pursuant to Section 1327(a):
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> > The purpose of section 1327(a) is the same as the purpose served by the general doctrine of res judicata. There must be finality in a confirmation order so that parties may rely upon it without concern that actions which they may thereafter take could be upset because of a later change or revocation of the order.

> *In re Walker*, 128 B.R. 465, 467 (Bankr. D. Idaho 1991)(quoting 5 *Collier on Bankruptcy*. ¶ 1327.01[1] (15th Ed. 1990)); *In re Varela*, 85 I.B.C.R. 10.
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> . . .
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> The Bankruptcy Code, Rules and rules of this Court, require a debtor to provide creditors with notice of a proposed plan and any relevant hearings. 11 U.S.C. § 1324; F.R.B.P. 2002(b); F.R.B.P. 3015; L.B.R. 2002.5. Once a debtor has satisfied this duty, the creditor bears the burden of taking affirmative steps to evaluate, advance, and protect its rights. *In re Walker*, 128 B.R. 465, 468 (Bankr. D. Idaho 1991); *In re Davies*, 90 I.B.C.R. 50, 52.
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> . . .
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> When a creditor receives notice of a Chapter 13 filing concerning its debtor, the creditor has also received at least constructive or inquiry notice that its claim may be affected by the proceedings, namely the confirmation of a plan. *In re Walker* at 467. If the creditor chooses to ignore such notice, it does so at its own peril. *Id.* Here, Plaintiff received notice of the Chapter 13 proceedings and had notice that the confirmation of Defendants' Plan could affect her claim.

99.1 I.B.C.R. at 17, 18, and 19.

The record reflects that Wallen was served in November 1997 with the plan, and notice of confirmation hearing and the bar date for objecting to confirmation. She did not object, and the plan was confirmed.

Wallen cannot now attack the confirmation order, or force renewed hearing on issues such as the plan's lack of compliance with § 1322(a)(2). *Croner*, 99.1 I.B.C.R. at 17-19. *See also, Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1999 WL 965651 (9th Cir. 1999):

> [A] failure to object to the plan or appeal the confirmation order "constitutes a waiver of [the creditor's] right to collaterally attack the confirmed plan postconfirmation on the basis that the plan contains a provision contrary to the Code."

1999 WL 965651 at *1, quoting *Great Lakes Higher Educ. Corp. v. Pardee (In re Pardee)*, 218 B.R. 916, 922 (9th Cir. BAP 1998).

The plan is therefore binding in its treatment of her. But the binding effect of confirmation cuts both ways; § 1327 binds debtors as well as creditors. Debtors have not paid what is now conceded to be, in some amount, a priority claim. Wallen thus gains the protection of § 1328(a)(2) which will render nondischargeable her priority claim unpaid at the plan's conclusion.[8]

4. Amount of claim.

As noted previously, the primary efforts of Baron and Wallen have been directed toward categorizing and characterizing various educational and medical expenses incurred by Wallen or the parties' children over several years and asserted by Wallen in her claim. There is a vast chasm between what Debtors think might legitimately be owed under and

[8] The Court is certainly aware of the fact that there is presently before it no motion, complaint or other request to determine dischargeability under § 1328(a), and that neither party has addressed it. That issue arises here solely in the context of determining whether the objection to claim is moot. Still, the Court is in a position to observe, based entirely on matters of record, that (a) Debtors have conceded that, to the extent Wallen has a claim under the 1995 New Jersey orders, such claim is entitled to § 507(a)(7) priority status; (b) that the plan makes no payment on any such claim; (c) that the plan has been confirmed and has become binding on Debtors and Wallen under § 1327(a); and (d) that §1328(a) and § 523(a)(5) make such a § 507(a)(7) claim nondischargeable to the extent unpaid whether or not "provided for" under the plan.

within the scope of the state court orders[9] and the amount exceeding $63,000.00 Wallen asserts in her claim is due. This spread is but one indication of the long-standing acrimony that marks the relations between these ex-spouses.[10] The parties dispute what expenses their children incurred and why, what was intended under the state court orders, even what their express agreements of record really mean.

The record is less than crystalline as to the intent of the state court (other than in adopting the settlement of the parties), or how that court would determine which educational and medical expenses were to be paid or reimbursed by Baron and those which were not. The parties have compounded the problem by their approach to the evidentiary record at hearing, and in the nature of their post-hearing submissions.

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[9] As noted, Debtors listed $3,500.00 in schedule F as an undisputed claim. Their briefing appears to acknowledge (subject in some regards to additional documentation) something in the range of a $2,000.00 to $4,500.00 liability.

[10] Their submissions indicate that the divorce decree was entered in March 1980, when their children, now adults, were aged 4, 5 and 7. The 1995 orders culminated, at least for awhile, what had been a lengthy and expensive legal fray.

The Court would, despite these and several other difficulties, resolve the question of the amount of Wallen's claim if it would serve a purpose.[11] But the Court concludes that there is no need to determine an exact amount of the claim at this time.

The claim of Wallen (whatever its proper amount) is, Debtors agree, a priority claim. This concession has rendered the objection moot.[12] The plan makes no provision for payment of priority support claims, §1322(a)(2), and that plan was confirmed, on notice, and is binding on Debtors as well as Wallen. § 1327(a). The claim will not be subject to discharge at the plan's conclusion. § 1328(a)(2), § 523(a)(5). The exact amount of that claim, therefore, is irrelevant for any present purpose in this chapter 13 proceeding.[13]

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[11] Section 704(5) requires a chapter 7 trustee to examine proofs of claim and object to those which are improper "if a purpose would be served" thereby. This section is made applicable to chapter 13 trustees by § 1302(b)(1). But where no distribution is to be made to the holder of the claim, and absent some other need to settle the amount or allowance of the claim, no purpose is served by the trustee's objection, or the Court's adjudication. *In re Riverside-Linden Investment Co.*, 85 B.R. 107, 111 (Bankr. C.D. Cal. 1988), *aff'd*, 99 B.R. 439 (9th Cir. BAP 1989). Similarly, § 502(c)(1) allows the Court to estimate any contingent or unliquidated claim if the actual fixing or liquidation would unduly delay administration of the case. Here the fixing or liquidation of the disputed and unliquidated Wallen claim has no impact or delay on the administration of the case. *See, In re Hamilton*, 91 I.B.C.R. 234, 238 (Bankr. D. Idaho 1991).

[12] The objection would not be moot if the objection to priority status was successfully pursued and Wallen's claim held to be a general unsecured claim, since establishing its proper amount would then have an impact on the class of unsecured creditors and their pro rated distribution under the plan.

[13] There is a possibility that the amount of the claim would be relevant should Debtors be able to modify their plan to fund it, and to ensure its discharge. However, no such motion has been made. The Court remains to be convinced that a modification to introduce a new class of omitted priority creditor falls within the limited grant of § 1329(a)(1).

Both parties would appear to be entitled to seek a determination from the New Jersey state courts, post-bankruptcy, as to the proper amount of the claim which survives if they remain unable to agree. In fact, it is clear that the best place to resolve the question of interpretation of the state court orders is the state court itself.[14]

The Court also has before it the Trustee's motion to dismiss. The existence of this unliquidated and unadjudicated priority claim does not, despite the Trustee's concerns, require the dismissal of this case. The Trustee can and should continue to administer the case according to the terms of the existing confirmed plan and confirmation order.[15]

CONCLUSION

The objection to the claim, to the extent it disputed Wallen's entitlement to priority status, has been withdrawn by Debtors. For the reasons stated, the Court deems it appropriate to deny, as moot, the balance of the objection to claim insofar as it seeks to establish the amount of Wallen's claim. Determining that issue will not serve a material purpose or have any present effect on the continuation of the chapter 13 case. And, finally, the Trustee's motion to dismiss has also, for the same reasons, been rendered unnecessary, and it will be denied without prejudice.

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[14] By virtue of the fact that this Court declines to rule on the amount of the claim, there is no collateral estoppel or similar impediment on the New Jersey courts in evaluating the parties' contentions and arriving at the amount of the nondischargeable claim.

[15] A different situation, and perhaps one requiring a § 1307(c) motion from the trustee, arises where the plan proposes payment of a given amount as a priority debt but that creditor's claim is filed in a higher amount, putting a debtor's compliance with §§ 1322(a)(2) and 1325(a)(1) at issue, unless the plan is amended (if the claim is filed preconfirmation) or modified under § 1329 (if the claim is filed after confirmation.)

An Order consistent herewith will be entered.

Dated this 3rd day of December, 1999.